

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 26, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3395-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARVIN J. THEIS AND LAVONNE K. THEIS,

PLAINTIFFS-RESPONDENTS,

V.

FORD MOTOR COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Ford Motor Co. appeals a summary judgment to Marvin and LaVonne Theis on their claim brought under Wisconsin's "lemon law," § 218.015, STATS.¹ Ford argues that the circuit court erred in granting

¹ This is an expedited appeal under RULE 809.17, STATS.

summary judgment to the Theises, in failing to reconsider its decision, and in failing to grant Ford's motion for relief from judgment. For the reasons set forth below, we affirm.

BACKGROUND²

On August 31, 1991, the Theises purchased a new 1991 Ford Explorer. On December 17, 1991, they returned the vehicle to the dealer for an evaluation of front end problems and because the car was high on engine oil, yet low on coolant. A service technician theorized that one or more cracked cylinder heads were permitting coolant to mingle with the engine oil. In order to test this theory, a dye was injected into the coolant, and the Theises were asked to drive the car for several days. The Theises drove the car a limited amount over the next several days in order to permit the dye to mingle with the coolant, as they had been instructed.

On December 26, 1991, the Theises returned the car to Ford.³ The dye proved to have stained the engine oil, as well as several spark plugs, indicating cracked cylinder heads. The Theises variously demanded the car be replaced with a new car, or that a new engine be installed. Ford agreed to replace the engine.

² Several of Ford's averments are "on information and belief." We disregard factual averments so made. *McChain v. City of Fond du Lac*, 7 Wis.2d 286, 290-91, 96 N.W.2d 607, 610 (1959) ("An affidavit on information and belief is an anomaly. It is not an affirmation on knowledge.... Facts are established on knowledge, not on information and belief."). Another Ford affidavit was untimely filed, and, like the circuit court, we do not consider it.

³ Although there is some dispute in the record, the parties agree that the Theises drove the car until "at least" December 26, 1991.

The Theises received their car back on January 15, 1992. On November 6, 1995, the Theises commenced this action under § 218.015, STATS.⁴

⁴ Section 218.015, STATS., reads in relevant part as follows:

(1) In this section:

(b) 4.(f) “Nonconformity” means a condition or defect which substantially impairs the use, value or safety of a motor vehicle, and is covered by an express warranty applicable to the motor vehicle or to a component of the motor vehicle, but does not include a condition or defect which is the result of abuse, neglect or unauthorized modification or alteration of the motor vehicle by a consumer.

(h) “Reasonable attempt to repair” means any of the following occurring within the term of an express warranty applicable to a new motor vehicle or within one year after first delivery of the motor vehicle to a consumer, whichever is sooner:

....

2. The motor vehicle is out of service for an aggregate of at least 30 days because of warranty nonconformities.

(2) (a) If a new motor vehicle does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the motor vehicle lessor or any of the manufacturer’s authorized motor vehicle dealers and makes the motor vehicle available for repair before the expiration of the warranty or one year after first delivery of the motor vehicle to a consumer, whichever is sooner, the nonconformity shall be repaired.

(b) 1. If after a reasonable attempt to repair the nonconformity is not repaired, the manufacturer shall carry out the requirement under subd. 2. or 3., whichever is appropriate.

2. At the direction of a consumer ... do one of the following:

a. Accept return of the motor vehicle and replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs.

b. Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security

(continued)

On June 3, 1996, the Theises moved for summary judgment on their lemon law claim. At a pre-trial conference on July 2, 1996, attended by counsel for both parties, a hearing on the motion was set for September 9, 1996. Counsel for Ford failed to record this date in her file. Thereafter, Ford obtained new counsel. Ford's outgoing counsel did not make the new counsel aware of the hearing date. At the September 9, 1996 hearing, no counsel appeared for Ford. The circuit court entered summary judgment for the Theises, concluding that certain of Ford's evidentiary submissions were "incredible as a matter of law," that Ford's choice of a repair solution was irrelevant to whether a condition or defect existed, and that, as a matter of law, the car had been "out of service" for thirty days, contrary to lemon law provisions. On September 13, 1996, Ford's successor counsel became aware of the summary judgment against Ford. Ford's counsel moved the circuit court to reconsider, and to grant relief from judgment on the ground of excusable neglect. The circuit court denied the motion, and this appeal followed.

ANALYSIS

We review a summary judgment order de novo, and we adopt the same methodology as the trial court. *Reel Enters. v. City of La Crosse*, 146

interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use.

....

(7) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this section. This court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss, together with costs, disbursements and reasonable attorney fees, and any equitable relief the court determines appropriate.

Wis.2d 662, 667, 431 N.W.2d 743, 746 (Ct. App. 1988). Under § 802.08(2), STATS., we must determine whether a genuine issue exists as to any material fact. In order to do so, we examine the affidavits or other proofs submitted in support of and in opposition to the motion. *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *Id.* On summary judgment, the court does not decide issues of fact; it determines whether there is a genuine issue of fact. *Id.* at 338, 294 N.W.2d at 477.

We have reviewed the affidavits of record. We conclude, as did the trial court, that the vehicle was out of service beginning December 17, not December 26. A vehicle is “out of service” for the purposes of § 218.015, STATS., when it “is not capable of rendering service as warranted due to a warranty nonconformity, even though the vehicle may be in possession of the consumer and may still be driven ... by the consumer.” *Vultaggio v. General Motors Corp.*, 145 Wis.2d 874, 886, 429 N.W.2d 93, 97 (Ct. App. 1988). The Theises had only limited use of the Explorer between December 17 and 26, driving it only in order to facilitate the diagnostic coolant-dye test. Therefore, it was out of service for at least thirty days, entitling the Theises to relief under the lemon law, § 218.015(2).

We reject the argument that the Theises’ request for an engine replacement can be used by Ford as a defense on the theory that the Theises invited the delay of over thirty days. The lemon law permits the court to consider whether the consumer abused or neglected the car, or performed an unauthorized alteration or modification. Section 218.015(1)(f), STATS. The lemon law does not permit the act of requesting specific repairs to be used against the consumer.

Indeed, such an interpretation would vitiate the purpose of the law because every request for repairs could potentially toll the thirty day period.⁵

We conclude that there were no material facts in dispute and that the Theises were entitled to judgment as a matter of law. We therefore affirm the trial court's award of summary judgment to the Theises.

Section 806.07, STATS., allows relief from judgment upon "such terms as are just." Whether to grant relief from judgment lies in the discretion of the circuit court. *Mullen v. Coolong*, 153 Wis.2d 401, 406-08, 451 N.W.2d 412, 414 (1990). A discretionary decision will be reviewed to determine whether it is "the product of a rational mental process by which the facts of record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The circuit court refused to reopen the judgment for two reasons. First, the court found that Ford's predecessor counsel knew of the hearing time, and it concluded successor counsel's failure to appear did not constitute excusable neglect. As an independent ground for refusing to reopen, the court noted that it had granted summary judgment on the merits, relying on the affidavits submitted. The court concluded that Ford had not, therefore, been prejudiced by the nonappearance of counsel at the motion hearing.

⁵ The trial court rejected Ford's expert's averment that cracked cylinder heads are not a defect which impairs the substantial use of a car, stating that the assertion was "incredible as a matter of law." Ford has not challenged the trial court's ruling on this point on appeal. Consequently, we do not address it. See *Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19, *cert. denied*, 506 U.S. 894 (1992).

Because we conclude that the court's decision was a reasoned and reasonable determination, premised on the proper standard of law and the facts of record, we affirm the circuit court's denial of Ford's motion for relief from judgment. *See id.* We note further that because this appeal has provided Ford a de novo review of the summary judgment entered against it, Ford was in no way prejudiced by the failure of its counsel to appear at the motion hearing in the trial court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

